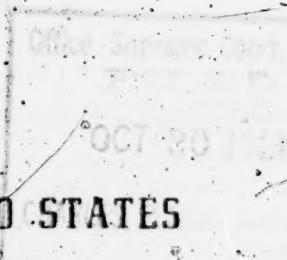


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 388 388

WELKER B. BROOKS,

Petitioner,

versus

UNITED STATES OF AMERICA

No. 389 389

JAMES M. BROOKS, ADMINISTRATOR OF THE ESTATE OF
ARTHUR L. BROOKS, DECEASED,

Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.

WHITEFORD S. BLAKENEY,

PIERCE AND BLAKENEY,

Counsel for Petitioners.

INDEX

SUBJECT INDEX

	Page
Petition:	
Statement of Case	2
Jurisdiction of This Court	3
Questions Involved	3
Reasons Why Certiorari Should Be Granted	4
Brief in Support of Petition:	
References to Opinion in Court Below	7
Jurisdiction of This Court	8
Statement of Case	8
Specification of Error	8
Argument	8

Outline of Argument

I. Except as otherwise specified therein Congress clearly intended the Federal Tort Claims Act to apply to members of the armed services, the same as to other citizens in general	8
A. If the Act be accepted as written, there is no problem	8
B. The broad exception or exclusion which the Government seeks to read into the Act is not permissible because Congress enumerated the exceptions and exclusions which it intended the Act to have	11
C. Congress specifically considered and specifically rejected an exception having the exact effect which the lower court has now read back into the Act	13
II. In any event, a person, merely because he is a member of the armed service, is not to be denied right of action	13

under the Federal Tort Claims Act if he has suffered an injury wholly unconnected with military affairs and not arising out of any armed service status or relationship	16
III. Upon analysis, it is to be seen that the Government's contentions are of no validity	17
IV. Welker B. Brooks' right of action is not barred by the fact that he has received certain disability payments from the United States Veterans' Administration	26

CASES CITED

<i>Adams Express Company v. Kentucky</i> , 238 U. S. 190, 199; 35 S. Ct. 824, 59 L. Ed. 1267, 1270	9
<i>Barber v. Minges</i> , 223 N. C. 213, 25 S. E. (2d), 837 (1943)	20
<i>Boggs-Rice Company</i> , 66 F. (2d) 855, 858 (C. C. A. 4th)	10, 25
<i>Brady v. United States</i> , 151 F. (2d) 742	20
<i>Caminetti v. United States</i> , 242 U. S. 470, 485; 37 S. Ct. 192; 61 L. Ed. 442, 452	9
<i>Cunard Steamship Co. v. Mellon, Secretary of the Treasury</i> , 226 U. S. 100, 128; 67 L. Ed. 894, 904	13
<i>Dahn v. Davis, Director General</i> , 258 U. S. 421; 42 S. Ct. 320; 66 L. Ed. 696	18, 19
<i>Dahn v. McAdoo, Director General</i> , 256 F. 549	19
<i>Dobson v. United States</i> , 27 F. (2d) 807	20
<i>Equitable Life Assurance Society v. Pettus</i> , 140 U. S. 226, 233; 35 L. Ed. 497, 500	13
<i>Jefferson v. United States</i> , 74 F. Supp. 209	14, 21
<i>Lapina v. Williams Commissioner</i> , 232 U. S. 78, 92; 59 L. Ed. 515, 520	12
<i>Mackenzie v. Hale</i> , 239 U. S. 299; 309; 36 S. Ct. 106; 60 L. Ed. 297, 300	9
<i>Moore Ice Cream Co. v. Rose, Collector of Revenue</i> , 289 U. S. 372, 377; 77 L. Ed. 1265, 1269	12
<i>Osaka Shosen Kaiun Line v. United States</i> , 300 U. S. 98, 101; 57 S. Ct. 356; 81 L. Ed. 532, 534	9

INDEX

iii
Page
19
19
20

Panama Railroad v. Minnix, 282 F. 47
Panama Railroad v. Strobel, 282 F. 52
Sandoval v. Davis, 288 F. 56
United States v. Martíne, 155 F. (2d) 456 (C. C. A. 4th)
United States v. Standard Oil Company, 332 U. S. 301; 67 S. Ct. 1604
Wood v. A. Wilbert's Lumber Co., 226 U. S. 384, 390; 67 L. Ed. 264, 267

TEXTBOOKS CITED

50 Am. Jur. pp. 204-207
 50 Am. Jur. Section 434; Page 455
 25 R.C.L. Section 230, Page 983

STATUTES CITED

Federal Tort Claims Act 2, 3, 14
 Title 28, United States Code, section 2671 2
 H. R. 181 15
 H. R. 7236 14
 Public Vessels Act, 46 U. S. C. A. 781 20
 Railroad Control Act, 40 Stat. 451 21
 Suits in Admiralty Act, 46 U. S. C. A. 742 19
 Title 28, United States Code:
 Section 2671 8
 Section 1254 3, 8
 Section 2680 11
 United States Employees' Compensation Act, 5
 U. S. C. A. 751 18

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PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully pray this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court

of Appeals has rendered in these cases; and the Petitioners respectfully show to the Court:

Statement of Case

These are suits under the Federal Tort Claims Act, Title 28, United States Code, section 2671 *et seq.* (formerly 28 U. S. C. A. 921 *et seq.*). They were instituted simultaneously in the United States District Court for the Western District of North Carolina, have been jointly dealt with in all proceedings up to this point and for convenience will sometimes be hereinafter referred to as one case.

The circumstances out of which these cases arose may be briefly stated as follows: on the night of February 17, 1945, at about 8:00 P. M., Welker B. Brooks and Arthur L. Brooks, brothers, were riding with their father, James M. Brooks, in their private automobile on a public highway near Fayetteville, North Carolina. Both Welker B. Brooks and Arthur L. Brooks were enlisted men in the United States Army, but they were on leave or furlough at the time and "engaged in their private concerns and not on any business connected with their military service" (R. 41).

As their car reached an intersection in the highway, it was struck by a motor-truck which was being driven by an employee of the United States Government, acting within the scope of his employment. (R. 10, 20 and 41). Welker B. Brooks was seriously injured and Arthur L. Brooks was instantly killed. The District Court found that the collision was caused entirely by negligence on the part of the Government employee and entered judgments in behalf of Welker B. Brooks and James M. Brooks, administrator of the estate of Arthur L. Brooks (R. 10 and 20).

The Government then moved that the judgments be set aside and the actions dismissed upon the ground that Welker B. Brooks and Arthur L. Brooks being members

of the United States armed service had no rights under the Federal Tort Claims Act (R. 23). This motion the District Court denied (R. 12 and 25). But upon appeal the United States Court of Appeals for the Fourth Circuit reversed the District Court upon the broad ground set forth in the Government's motion referred to above, that is: that no matter what the circumstances or situation may be, a member of the armed services of the United States has no right of action under the Federal Tort Claims Act (R. 47 and 49).

Jurisdiction of This Court

Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in these cases is conferred upon this Court by the provisions of Title 28, United States Code, section 1254 (formerly 28 U. S. C. A. 347).

Questions Involved

Did Congress intend that members of the armed services should have no rights of action under the Federal Tort Claims Act?

More particularly, if a member of the armed services is injured under circumstances wholly unconnected with military affairs and not in any way growing out of any armed service status or relationship; and if, the situation is one which may readily occur and does occur with respect to persons not in the armed service and is a situation in which other persons, in general, do clearly have rights of action under the Federal Tort Claims Act—did Congress nevertheless intend that in such situation the claimant, merely because of the circumstance that he belongs to the armed service, shall have no right of action?

Reasons Why Certiorari Should Be Granted

1. This is a case of first impression in this Court. It squarely presents a broad and prominent issue in the interpretation and application of an important new Federal Statute; and the issue is such that it unquestionably ought to be decided and settled by this Court.
2. In the Federal Tort Claims Act the United States broadly waives its immunity to tort actions and consents that such actions may be brought against it. This case presents the issue as to whether such waiver and consent was not intended, under any circumstances, as to millions of United States citizens, namely, the members of our armed services.
3. The case is thus one of general public interest and concern, involving an important and novel question of Federal law which calls for the attention and judgment of this Court.
4. The case should, moreover, be reviewed and decided by this Court because, it is respectfully submitted that, it has been wrongly decided in the Court of Appeals below, the majority in that Court having adopted an unnatural course of reasoning in the face of conclusively opposing considerations, to reach a result not only erroneous but also inequitable—all of which is fully shown in a brief hereinafter following.
5. It is further to be noted, as indicated above, that the decision of this case in the Court of Appeals was divided, Chief Judge John J. Parker strongly dissenting from the majority composed of one Circuit Judge and one District Judge. Thus, considering the contrary opinion and ruling of the District Judge who presided at the trial, judicial authority upon the case is in fact evenly divided up to the present time.

Wherefore, upon all the foregoing and upon the reasoning and authorities set forth in the brief annexed hereto, the petitioners earnestly pray this Court to grant certiorari in this case to the end that the Court may review the decision rendered herein by the Court of Appeals below.

WELKER B. BROOKS,

JAMES M. BROOKS,

*Administrator of the Estate of
Arthur L. Brooks, Deceased;*

By: WHITEFORD S. BLAKENEY,

PIERCE AND BLAKENEY,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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Petitioner

vs.

UNITED STATES OF AMERICA

**BRIEF IN SUPPORT OF PETITION FOR WRITS OF
CERTIORARI**

References to Opinion in Court Below

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on August 26, 1948. The majority opinion and the dissenting opinion have not yet been printed in the official reports but do appear fully in the record which has been filed in this Court. (R. 40).

Jurisdiction of This Court

As pointed out hereinabove (P. 2) in the Petition for Writ of Certiorari, jurisdiction to review the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28, United States Code, section 1254 (formerly 28 U. S. C. A. 347).

Statement of Case

A full outline and statement of the case appears hereinabove (P. 2) in the Petition for Writ of Certiorari.

Specification of Error

The petitioners assign as error the reversal by the Court of Appeals of the judgments which were rendered in the District Court.

ARGUMENT

I

Except as otherwise specified therein, Congress clearly intended the Federal Tort Claims Act to apply to members of the armed services, the same as to other citizens in general.

A. If the Act be Accepted as Written, there is No Problem.

First and foremost, it is to be noted that if the Act be accepted as written, the case is immediately resolved in favor of the petitioners. Problem is created only by the Government's insistence that there be written into the Statute a provision which does not appear upon its face.

The central provision of the Act, Title 28, United States Code; section 2671 *et seq.* (formerly 28 U. S. C. A. 921 *et seq.*), is that:

“ . . . The United States District Court . . . shall have exclusive jurisdiction to hear, determine and

render judgment on any claim against the United States . . . on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . ”

It is, says the Court of Appeals, (R. 41), “crystal clear” that this language covers a claim by a member of the armed services as well as it does a claim by any other person. Despite this admitted clarity, however, the Court declares that the Statute must be read as if there appeared in it after the phrase “any claim”, a large qualification:—“except in behalf of members of the armed services of the United States”. It is respectfully submitted that, when a court finds statutory language “crystal clear”, it should leave it as it finds it and not undertake to modify or qualify its natural effect and meaning.

“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.”

Caminetti v. United States 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, 452;

Mackenzie v. Hare, 239 U. S. 299, 309, 36 S. Ct. 106, 60 L. Ed. 297, 300;

Adams Express Company v. Kentucky, 238 U. S. 190, 199, 35 S. Ct. 824, 59 L. Ed. 1267, 1270.

“(This) is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction.”

Osaka Shosen Kaisha Line v. United States, 300 U. S. 98, 101; 57 S. Ct. 356; 81 L. Ed. 532, 534.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pp. 204-207, as follows:

"A statute is not open to construction as a matter of course . . . Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning . . . the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

These principles have been recognized by the Court of Appeals for the Fourth Circuit in the past:

"But the language of the statute is free from ambiguity; and, where this is the case, its plain meaning is to be accepted without resort to the rules of interpretation."

In Re Boggs-Rice Company, 66 F. (2d) 855, 858 (C. C. A. 4th).

And in this case the court agreeing that the language of the Act clearly covers and includes claims by members of the armed services, it was improper for the court then to proceed to read such claims out of the Act.

B. The Broad Exception or Exclusion Which the Government Seeks to Read into the Act is not Permissible Because Congress Enumerated the Exceptions and Exclusions Which it Intended the Act to Have.

The contention that the Act is to be accepted as written is supported by the fact that in the Act Congress expressly named and defined such claims as it desired to exclude from the operation of the Act. It is not to be argued that Congress failed to give attention to what exceptions it desired to make in respect to the coverage of the Act and that the Act being such a broad departure from traditional governmental policy and immunity, it becomes necessary for the court to write in such exceptions as it thinks Congress would have desired. Not so at all. For Congress did give its attention to the very question of what sort of claims and claimants should be excluded from the Statute, and in what situations and to what extent. And Congress did expressly write into the Statute the exceptions and exclusions which it desired the Statute to have; listing and carefully defining twelve in number, *seriatim*, Title 28, United States Code, section 2680 (formerly 28 U. S. C. A. 943).

Two of these exceptions, (j) and (k), go a long way in themselves toward answering two of the Government's major contentions. The argument that it is a too radical departure from past policy and from the military atmosphere to permit armed service personnel to have rights of action against the Government, is to a great extent answered by the exception (j) that no claim "arising out of combatant activities . . . during time of war" is cognizable under the Act. The fear that rights of action in the hands of military personnel will give rise to a greater volume of suits than such rights of action in the hands of citizens generally is likewise largely relieved by the same exclu-

summary provision and by the further exception, (k) which has its chief 'practical' application to military personnel, that 'no "claim arising in a foreign country" may be maintained under the Act.'

Such being the situation with respect to the exceptions and exclusions prescribed by Congress, it is no proper function or prerogative of a court to say, as the Court Below has said, that Congress really intended another important exception but forgot or overlooked writing it in and that therefore the court will do so. Why should the court assume that Congress was absent-minded or inadvertent to what it was doing? Since Congress spelled out with care and detail exceptions to the Statute, should not the court rather assume that Congress acted consciously and deliberately, declared the exclusions and exceptions which it desired the Statute to have, and did not write in any general exclusion of members of the armed services because it did not intend any such exclusion. In short, Congress having addressed itself to the task of naming exceptions and exclusions is it to be accepted that Congress named all it desired and intended, or is it to be presumed that Congress overlooked a very important one which it did desire and intend? The Court Below says that the latter is to be assumed. The petitioners respectfully submit that such assumption is the very opposite of natural and logical reasoning and is contrary to normal principles of statutory construction.

"The section contains its own specific provisions and limitations, and these, in familiar principles, strongly tend to negative any other and implied exception."

Lapina v. Williams, Commissioner, 232 U. S. 78, 92, 58 L. Ed. 515, 520.

"The implication is that any proceeding not covered by the exception is to be subject to the rule."

Moore Ice Cream Co. v. Rose, Collector of Revenue, 289 U. S. 373, 377, 57 L. Ed. 1265, 1269.

"It (the exception) serves to show that where, in other provisions, no exception is made none is intended."

Cunard Steamship Co. v. Mellon, Secretary of the Treasury, 226 U. S. 100, 128, 67 L. Ed. 894, 904.

"This construction is put beyond doubt by § 5986, which, by specifying four cases in which the three preceding sections shall not be applicable, necessarily implies that those sections shall control all cases not so specified"

Equitable Life Assurance Society v. Pettus, 140 U. S. 226, 283, 35 L. Ed. 497, 500.

"These special exceptions exclude any other."

Wood v. A. Wilbert's Lumber Co., 226 U. S. 384, 390, 57 L. Ed. 264, 267.

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions."

25 R. C. L., Section 230, page 983.

"Where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made."

50 Am. Jur., Section 434, page 455.

C. *Congress Specifically Considered and Specifically Rejected an Exception Having the Exact Effect Which the Lower Court Has Now Read Back Into the Act.*

Utterly conclusive of the case would seem to be the fact that Congress specifically considered and deliberately rejected an exception having exactly the same effect as that

which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances.

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present Law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But in addition to these, there was at that time another exception proposed which would have excluded from the coverage of the Act:

"Any claim for which compensation is provided by the World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated Statute. Conversely it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032 and see also footnote, p. 212; *Jefferson v. United States*, 74 F. Supp. 209) that under the proposed statute's general opening of the way to tort suits against the Government, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the Statute. Though debated, the bill was of course not enacted by the 76th Congress.

In the 79th Congress, the same bill, re-titled H. R. 181, was again introduced with all its exceptions including the additional or thirteenth exception quoted and discussed above. Congress again considered the Bill, *struck out of it the exception in question*, and enacted the remainder as the present Federal Tort Claims Act. Yet the Court below now sees fit to put back into the Statute the exact effect that Congress deliberately struck out of it! In this it is respectfully submitted, the Court exceeded its province.

Chief Judge Parker, in his vigorous dissenting opinion below, clearly points out this "conclusive" feature of the case (R. 56):

"In my opinion the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the Act, upon its passage."

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. And the Court below does wrong to treat it as if it were. The Court does wrong to assume that Congress was not aware of or did not comprehend what it was doing, even though it used words "crystal clear", when it enacted a statute broad enough to include within its scope members of the armed services along with all other persons generally. The Court does wrong to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all the Court does wrong when it disregards the fact that Congress did consider such thirteenth exception. And for the Court to write the effect of that exception back

into the Statute after Congress deliberately and specifically struck it out, is unjustifiable.

H

In any event, a person, merely because he is a member of the armed service, is not to be denied right of action under the Federal Tort Claims Act if he has suffered an injury wholly unconnected with military affairs and not arising out of any armed service status or relationship.

Welker B. Brooks and Arthur L. Brooks were soldiers. But their being soldiers had nothing whatever to do with their respective injury and death. As the Court below recognizes (R. 41), they were at the time of the event here involved, "on leave or furlough engaged in their private concerns and not on any business connected with their military service." They were riding with their father in their private automobile on a public highway when they were struck by a Government vehicle negligently driven by a civilian employee of the Government.

They were not on the highway because of their being soldiers. The event which brought death to one and serious injury to the other did not occur in any sense whatsoever because of their having military status. No armed service duty, activity or relationship was any factor in bringing the injuring force in contact with them.

It is inconceivable that their father, who rode beside them, should be allowed to recover, but they, because they had on uniforms, are denied all right of action! Shall a man, as he walks the public streets or travels the highways or goes about his personal affairs be at greater risk than other citizens because of the fact that he serves in the armed forces and they do not? It would seem that if there had to be a distinction in civil rights as between the soldier and his fellow citizens, it should certainly not be to his disadvantage.

Suppose that a soldier, home on furlough, is standing on a public sidewalk talking with a group of his friends as they welcome him back to town. And suppose that a motor vehicle negligently driven by an employee of the United States Department of Commerce, for example, runs up on the sidewalk and injures the soldier and everybody else in the group. Thereupon, all of them, *except the soldier*, according to the Court below, have rights of action under the Federal Tort Claims Act. He alone has no right in court.

Shall the Government thus make a man's military status *the basis for distinguishing against him* in situations unrelated to military affairs? Shall a nation which dispenses largesse the world around thus discriminatorily deal with the men who fight its battles—even when it negligently injures them in non-military relationships? And above all, shall a court labor to achieve this result in the face of the clearly manifested intent of Congress to the contrary?

III

Upon analysis, it is to be seen that the Government's contentions are of no validity.

It is argued by the Government that since Congress in the various Veterans' Acts has provided certain benefits in case of injury to or death of military personnel, it cannot also have intended them to have rights of action under the present Statute. It would seem that a very proper reaction is—why not? Such veterans' "benefits" might well be regarded as in the nature of accident and health compensation incident to their military service and not of such magnitude as to render it impossible or unlikely that Congress should also wish to grant to military personnel the same rights of action granted to other citizens generally in the Federal Tort Claims Act.

Is it not reasonable that in consideration of his service to

his country, Congress in the Federal Tort Claims Act may have desired the soldier to have what was now being bestowed upon all others in addition to the special benefits he already had—any recovery by him under the Federal Tort Claims Act admittedly to be diminished, however, by the amount of any compensation payments received by him under the Veterans' Acts. If Congress saw fit to deal thus generously, or fairly, with those who serve in the armed forces, there would seem to be no reason why the Court should quibble with such intention or be reluctant to recognize and enforce it.

Nor are the benefits under the Veterans' Acts so overwhelming as might be supposed. Actually in the instant case, the record shows no benefits received except as follows: in the case of Arthur L. Brooks, a \$468 gratuity payment to the mother of the deceased; and in the case of Welker B. Brooks, hospital and medical care until he was discharged from the Army and disability payments currently in the amount of \$27.60 per month. By contrast to the rights of civilians under the Federal Tort Claims Act, these veterans' "benefits" are obviously meager indeed.

The United States Employees' Compensation Act, 5 U. S. C. A. 751 *et seq.* provides for civilian employees of the Government a system of benefits corresponding to that provided for members of the armed services by the various Veterans' Acts. This Court has referred to that system for compensation of governmental civilian employees as "elaborately and carefully worked out" (see *Dahn v. Davis*, Director General, 258 U. S. 421, 431; 42 S. Ct. 320; 66 L. Ed. 696, 699), just as the Government and the court below now refer to the system for compensation of service men under the Veterans' Acts. But it has been expressly and repeatedly held that under Federal statutes waiving governmental immunity to tort suits, civilian employees of the Government, like

other citizens generally, may sue, even though they have available to them the "comprehensive" benefits provided by the United States Employees' Compensation Act.

It has been so held under the Suits in Admiralty Act, 46 U. S. C. A. 742 *et seq.*

United States v. Marine, 155 F. (2d) 456 (C.C.A. 4th).

It has been so held under the Federal Employers Liability Act involving a situation in which the defendant, a corporation, was wholly owned by the United States.

Panama Railroad v. Minnix, 282 F. 47;

Panama Railroad v. Strobel, 282 F. 52.

It has likewise been so held under the Railroad Control Act of 1918, 40 Stat. 451.

Dahn v. McAdoo, Director General, 256 F. 549;

Dahn v. Davis, Director General, 258 U. S. 421; 42 S. Ct. 320; 66 L. Ed. 696.

In *Dahn v. Davis, Director General, supra*, this Court said:

"Thus, plainly, the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and, if successful, his recovery must have been from the United States. . . . This reference to the two acts shows that the petitioner had two remedies, each for the same wrong, and both against the United States. . . ."

In *United States v. Murine, supra*, the Court of Appeals similarly said:

"We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Em-

ployees' Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms.

"What we have shown . . . impels the conclusion that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms."

If then, civilian employees of the Government may sue the United States under other statutes which waive governmental immunity, and certainly, therefore, may also sue under the Federal Tort Claims Act, despite the benefits available to them under the United States Employees' Compensation Act, why may not service men likewise sue under the Federal Tort Claims Act, despite the benefits available to them under the Veterans' Acts?

The Veterans' Acts, of course, contain no stipulation that they shall be the service man's only remedy or recourse against the Government. Under compensation statutes which provide however that they constitute sole and exclusive remedies, as is the case with many state workmen's compensation acts, for example, in North Carolina where the present actions arose, it is, nevertheless, held that an employee may sue his employer in ordinary court action if his employer has negligently injured him under circumstances, as in the present case, having no relation to his employment status.

Barber v. Merges, 223 N. C. 213, 25 S.E. (2d) 837 (1943).

The Government points to *Dobson v. United States*, 27 F. (2d) 807; *Brady v. United States*, 151 F. (2d) 742; and *Sandoval v. Davis*, 288 F. 56, as being authorities to the effect that members of the armed services could not sue the United States under other statutes which waived governmental immunity to tort actions. With respect to the statutes involved in those cases, *Public Vessels Act*, 46 U. S.

C. A. 781 *et seq.* and Railroad Control Act of 1918, 40 Stat. 451 (now repealed), it is first to be noted that none of the highly decisive features discussed under the headings I(B) and I(C) of this brief were present. Moreover those statutes waived governmental immunity under certain conditions and to a limited extent only, applied only to the particular agencies of transportation referred to in their titles, and certainly evidenced no fundamental and over all policy to reverse the general immunity of the United States in tort cases, such as is the clear purpose of the Federal Tort Claims Act. Even *Jefferson v. United States*, 74 F. Supp. 209, 212 and 213, strongly approved by the court below, rejects the *Dobson*, *Brady* and *Sandoval* cases as containing any reasoning or as constituting authority for denying service men the right of suit under the present Act.

Furthermore, in fundamental contrast to the present case, the injuries involved in the *Dobson*, *Brady* and *Sandoval* cases were "service-caused", that is, occurred because the injured men were members of the armed forces and incurred their injuries during the course of activities necessitated by or incident to their military service. In the present case, as hereinabove emphasized, such was definitely not the situation.

As mentioned above, the lower court speaks with high approval of *Jefferson v. United States*, 74 F. Supp. 209 and 77 F. Supp. 706. That case was, however, fundamentally different from the instant case in the same basic respect, in that the injury involved was "service-caused". *Jefferson v. United States* is no authority upon the present situation. On the contrary, the reasoning of the opinions in that case indicates that the court would have reached there the conclusion for which the petitioners here contend, had the injury in that case been unrelated to military status as is the situation in the present case. The court in that case

emphasizes the fact that the plaintiff and the person who negligently injured him were both members of military personnel and were both on active duty at the time of and in connection with the plaintiff's injury.

The underlying thought expressed by the court in the *Jefferson* case is that the Federal Tort Claims Act makes the United States liable only "... under circumstances where private persons would be liable, ..." The court's reasoning is that the Act does not contemplate and cover claims arising from relationships between a claimant and the operator of an army, navy or other military establishment, for the simple reason that no such claims or suits are cognizable under local law or "law of the place". But irrespective of the validity of this reasoning, it does not have, nor did it purport to have, any application to such situation as exists in the instant case.

The plaintiff in *Jefferson v. United States* was, on the operating table, where he was negligently injured, *only because of his being a soldier*. The army surgeon was operating on him *only because of the military and army relationship* between the two of them. In the present case, Welker B. Brooks and Arthur L. Brooks were on the public highway, not in the course of any action or activity as soldiers. They were struck by the Government's employee, not because of any military or army relationship between him and them, but because they, in their purely private affairs, got out on the highway at the same time he was driving on it. Such are very usual and ordinary "circumstances" (to use the language of the Act) under which the "law of the place" makes private persons liable—and such, therefore, are "circumstances" in which the Act makes the United States liable.

The court below reasons that since Congress specified situations, for example under exceptions (j) and (k) here-

in above referred to, in which no person should have any right of action under the Federal Tort Claims Act, therefore Congress must have intended that members of the armed service should have no rights of action whatever under the Act. Thus, says the court, it would be "fanciful" to allow a service man to sue for an injury wholly unrelated to his military service since, by reason of exception (j), he is not allowed to sue for an injury received in combat. And he is not to be permitted to sue for an injury received in Plattsburg, New York, for example, inasmuch as he is precluded, by exception (k), from suing in case of an injury incurred just across the border in Canada! In other words since Congress did not see fit to give him a right of action for injury wherever occurring and under all circumstances, therefore he should have no right of action for injury anywhere or under any circumstances.

It is respectfully submitted that the exact reverse of this is the more normal reasoning and certainly produces a more equitable result. Since Congress took the pains to spell out situations in which rights of action should not be allowed to the soldier, nor to anybody else for that matter, wherein does it follow that Congress intended him to have no rights of action at all? If Congress specifies situations in which he is shut off from suing, is it not the natural inference that in other situations he may sue—otherwise why was it necessary to declare that in the designated cases he could not sue?

The ironic aspect of the Court's reasoning on this point is, however, that it would deny any application of the Act whatever. It would not only exclude members of the armed services from the operation and benefit of the Act, but likewise all other persons whomsoever! Exceptions (j), and (k) apply generally to all persons. They preclude anybody from suing under the Act on any claim "arising out of combatant activities" or on any claim "arising in a

be allowed to sue under the Act for any injury because he could not sue for an injury occurring just outside the United States, then likewise all persons are precluded from suing for any injuries, because they too could not sue, any more than the soldier, for injuries occurring just outside the United States.

The natural view would seem to be that the exclusion of rights of action in certain situations is all the more reason for affirming such rights of action in all other situations. The fact that a soldier has no right of suit for a leg injured in Canada is certainly in itself no reason to deny him a right of suit for his other leg injured in the United States. It does not follow either in logic or equity that since he cannot sue for both, *therefore* he cannot sue for either! To vary the metaphor, since Congress in the Act's exceptions trimmed the statutory loaf as it placed it in the hands of citizens in general, how does the Court find that to be a reason for denying the loaf to the service man altogether?

Various ills, such as "the subversion of military discipline" and "a flood of litigation," are prophesied if members of the armed services are held to have rights of action under the present Statute. The first answer to this is that if, despite such considerations, Congress saw fit, as is herein shown, to extend the benefit of the Act to members of the armed services along with other persons in general, that is a decision which the court should not quarrel with nor undertake to reverse.

In the next place, it would seem that such fears of evil consequences are not well-founded. As has been pointed out above express exceptions in the Act eliminate a major proportion of possible claims by military personnel, that is, all claims arising out of combatant activities in time of war and all claims arising in a foreign country. But whether well-founded or not, such forebodings have no application to cases such as the present. There is no tend-

ency toward subversion of military discipline in the right of service men to sue for injuries wholly unconnected with military matters. And it does not multiply litigation that a soldier may sue for non-military injury which would have occurred to him just as truly had he been a civilian and for which, as a civilian, he would have a right of suit under the Act.

The Court below denounces "the inept draftsmanship" of the Act "in failing to make clear and express provisions" as to members of the armed forces. It is respectfully submitted that "the inept draftsmanship" is to be found only in what the Court has written into the Act.

"The rules of interpretation are resorted to for purpose of resolving ambiguity, not for purpose of creating it."

In Re Boggs-Rice Company, 66 F. (2d) 855, 858 (C. C. A. 4th).

If Congress intended what the court says it intended, that is to exclude members of the armed services from the coverage of the Act, then it did indeed draw the Act ineptly for, as hereinabove shown, there is nothing in the Act manifesting any such intention. Admittedly the Act is inept, in fact it wholly fails, to express the intent for which the Government contends.

What the court therefore means by its statement is that the Act is ineptly drawn to express the intention for which the petitioners contend. But how so? What language is more apt to express the intention that the Act shall cover the claims of members of the armed services along with the claims of other persons in general—what words are more apt to express such intention than those which Congress used, namely, "any claim"? The court's suggestion comes to the proposition that there should be inserted in the Statute some provision to the effect that—"The words 'any

claim' are intended to include any claim by members of the armed services of the United States."

Such would have been "inept draftsmanship", indeed. After using all-inclusive wording, it was certainly not necessary and it would not have been wise to refer to a certain class of claims as being included in the all-inclusive language. To do so would have been productive of endless question and confusion as to whether other classes of claims not so singled out should or should not be considered as covered by the Act. It is respectfully submitted that the Federal Tort Claims Act is aptly and properly written to effect what was, as shown in this brief, undoubtedly the intention of Congress upon the issue here involved, namely, that members of the armed service should not be totally excluded from the benefit of the Act.

IV

Welker B. Brooks' right of action is not barred by the fact that he has received certain disability payments from the United States Veterans' Administration.

This aspect of the Welker B. Brooks' case is not discussed by the Court below and it would seem that the Court acquiesced in the decision and action of the District Court on this issue. Probably, however, the Government will continue to urge its contentions on this point and the matter is therefore here briefly discussed.

The Government's argument is that even though the petitioners have rights of action under the Federal Tort Claims Act, Welker B. Brooks' right of action is, nevertheless, lost to him because he has been receiving from the Veterans Administration compensation for his disability at the rate of \$27.60 per month.

It is, in the first place, to be noted that Welker B. Brooks' right of action "in accordance with the law of the place"

where the act or omission occurred" (to use the language of the Act) included a right to recover for such elements of damage as the pain and suffering he endured on account of his injuries, which elements are not in any way included in the disability payments he has been receiving from the Veterans Administration. The District Court points this out (R. 32 and 33), making it clear that it took the disability payments into consideration in diminution of Welker B. Brooks' verdict but did not regard such payments as altogether destroying the statutory right of action.

Upon the arguments hereinbefore advanced and particularly in view of the fact that Congress specified the respects in which it wished to qualify or withhold the application of the Statute, the reasonable and proper conclusion would seem to be that if Congress wished to bar suits where disability payments have been received, it would have said so.

In *Jefferson v. United States*, *supra*, it is pointed out that Congress in drawing the bills predecessor to the present Act, expressly excluded all rights of action if any disability benefits had been received. Congress certainly, therefore, acted consciously and with deliberate intention in omitting any such provision from the present Act. From all of which it certainly follows that if a member of the armed services otherwise has a right of action under the Federal Tort Claims Act, then the receipt of disability payments from the Veterans Administration does not operate to bar thereof but only in diminution of damages.

A recent decision of this Court would seem to be in point against the Government on this issue. In *United States v. Standard Oil Company*, 332 U. S. 301; 67 S. Ct. 1604, this Court held that when a soldier is tortiously injured in time of war, he may receive medical care and hospitalization from the United States Government, and may at the same time, collect damages from the third party tortfeasor, and that in such situation, there is no subrogation on the part

of the Government to the soldier's rights against the third-party tort-feasor. Since the Act now under consideration makes the Government just as liable as a private tort-feasor would be, it would seem to follow from this decision that the Government may make veteran's payments to a service man and at the same time be liable to him as a tort-feasor.

The Government relies upon the proposition that if Welker B. Brooks had any right of action under the Federal Tort Claims Act, then he had to elect whether he would exercise such right or accept disability payments. As a matter of reality, he, of course, had no opportunity to elect for the simple reason that the Federal Tort Claims Act was not in existence at the time he was injured nor at the time he began to receive disability benefits. Likewise, if the Veterans Administration should discontinue its payments to him, as it may do, neither would he then have any effective election to proceed under the Federal Tort Claims Act, because the time limitations prescribed in the Act would have run against him.

Certainly, the \$27.60 payments which Welker B. Brooks has received should apply, as the District Court applied them, only in diminution of the amount of his claim and not in complete bar of his right to sue.

Upon all that is herein set forth, the petitioners earnestly insist that their application for writ of certiorari should be granted and that the decision of the Court below should be reviewed and reversed.

Respectfully submitted,

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